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IN THE

Supreme Court of the United States

October Term, 1953

FRANK J. FALSONE,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

No._____

---

(1) PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled cause June 26, 1953 (R 55) affirming an order of the United States District Court for the Southern District of Florida entered April 24, 1953 (R 26-27). The District Court's order, so affirmed, required the Petitioner to appear before a special agent of the Bureau of Internal Revenue, to produce certain documents requested, and to give testimony.

JURISDICTION

The judgment of the Court of Appeals was entered June 26, 1953 (R 55).

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, being 28 USC Section 1254(1).

OPINIONS BELOW

The order of the District Judge (R 26-27) is unreported.

The opinion of the Court of Appeals is not yet reported.

Record References. The Court of Appeals heard the cause on typewritten record. References in this petition are to the record as printed by Petitioner for submission to this Court, and not to the typewritten record as certified by the Court of Appeals.

QUESTIONS PRESENTED

The Petitioner contends that the Court of Appeals, in affirming the District Court, erred in these principal respects:

(1) It required a certified public accountant to turn over to an agent of the Bureau of Internal Revenue, certain documents or records in his files, but which were owned by and under the legal control and possession of his client, the taxpayer, who had demanded their return.

(2) It refused to recognize that a proceeding in the District Court to compel a witness to testify before an agent of the Bureau of Internal Revenue was governed by the Federal Rules of Civil Procedure concerning applicable rules of evidence.

(3) It refused to recognize that an enrolled practitioner before the Treasury Department should enjoy, as to privileged communications, the same status as an attorney at law.

Consequently, the questions presented are:

I

Is a certified public accountant required to turn his client's documents in his files over to an agent of the Bureau of Internal Revenue in proceedings under §§ 3614 and 3633 of the Internal Revenue Code (26 USC §§ 3614, 3633), when the client has demanded their return?

II

Are the rules of evidence prescribed by the Federal Rules of Civil Procedure applicable to a proceeding in the District Court to compel testimony and production of documents before an internal revenue agent under § 3633 of the Internal Revenue Code (26 USC § 3633)?

III

When an agent is enrolled to practice before the Treasury Department on exactly the same basis as an attorney at law, must he follow the same rule as to privileged communications as an attorney at law?

STATUTES AND RULES INVOLVED

Federal Statutes

The Federal statutes under which the government purported to act in this case are:

Internal Revenue Code § 3614(a) (26 USC § 3614(a)):

EXAMINATION OF BOOKS AND WITNESSES

(a) To Determine Liability of the Taxpayer. —The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Internal Revenue Code § 3633 (26 USC § 3633):

JURISDICTION OF DISTRICTS COURTS

(a) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(b) To Issue Orders, Processes, and Judgements.—(See SEC. 3800 which reads as follows:

SEC. 3800. JURISDICTION OF DISTRICT COURTS TO ISSUE ORDERS, PROCESSES AND JUDGMENTS.

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.)

Rules of Civil Procedure for Federal District Courts

The rules of civil procedure for District Courts which Petitioner contends are applicable to the proceeding in the District Court are:

Rule 1. Scope of rules.—

These rules govern the procedure in United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (As amended Dec. 29, 1948).

Rule 81 (pertinent provisions):

(a) (3) * * * These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any

statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

(e) Law applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. * * * When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

Rule 43. (pertinent provisions) Evidence.—

(a) Form and admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Florida Statute

The Petitioner contends that the following statute of the State of Florida is applicable:

Florida Statutes 1951, Section 473.15 (FSA § 473.15):

Communications between accountant and client privileged.—All communications between certified public accountants and public accountants and the person for whom such certified public account-

ant or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained by certified public accountants and public accountants in their professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all of the courts of this state, and no such certified public accountant or public accountant shall be permitted to testify with respect to any of said matters, except with the consent in writing of such client or his legal representative.

STATEMENT OF THE CASE

The Petitioner is a certified public accountant and is enrolled to practice before the Treasury Department (R 15, 19, 20).

On April 6, 1953, the Petitioner was served with a document entitled a "Summons" [1], requiring him to appear and testify before an internal revenue agent in the matter of the tax liability of his clients, Salvatore Italiano and his wife, Maria, and to bring with him the following books and papers:

---

[1] This document was purportedly issued under authority of § 3614 of the Internal Revenue Code. It is not a subpoena or summons in any legal sense (see definition in *Black's Law Dictionary*, 3rd edition, pp. 1669, 1678). It is a mere notice and without any legal effect whatsoever. There are no penalties for refusing to answer it; and the administrative agency itself has no process to enforce it. The Court's action under Section 3633, Internal Revenue Code, is an independent proceeding for a legally enforceable process, although the issuance of the notice under Section 3614 may be a condition precedent to the Court's action under § 3633. *In re Wolrich*, 84 F. Supp. 481, 482, (DC, SDNY, 1949), where proceedings under Section 3615 of the Internal Revenue Code are compared; and Barnes, *Inquisitorial Powers of the Federal Government Relating to Taxes*, 28 Taxes, The Tax Magazine, 1211, 1213, December, 1950.

"All books, papers, records or memoranda in your files relating to:

(1) Individual income tax returns of Salvatore Italiano and Maria Italiano for the years 1940 to 1946, inclusive.

(2) Corporation income tax returns of Anthony Distributors, Inc. for the years 1940 to 1951, inclusive."

On the appointed day, April 8, 1953, Petitioner appeared in response to the "summons", but refused to produce the books, papers, records or memoranda called for or to testify concerning those documents.

The respondent, on April 9, 1953, filed in the District Court its Petition for the Production of Records; and on the same day, on an *ex parte* hearing, the District Court entered an order directing Petitioner to appear before an internal revenue agent and produce the documents requested by the "summons" and testify. This order also directed Petitioner to retain all documents in his possession for compliance with the summons, or such other disposition as the court might direct (R 13, 14).

On April 13, 1953, Petitioner filed his motion to quash the "summons" and vacate the court's *ex parte* order (R 15-20); and after hearing on this motion, the court on April 24, 1953, denied the Petitioner's motion and directed the Petitioner to appear before another internal revenue agent at a new time and place to produce documents and testify in accordance with the court's earlier *ex parte* order (R 26-27).

The Petitioner filed notice of appeal to the Court of Appeals for the Fifth Circuit on April 27, 1953 (R 28); and on the District Court's denial of stay and supersedeas, obtained stay and supersedeas from the Court of Appeals. Hearing was had before the Court of Appeals on May 11, 1953, and that Court gave its decision and judgment affirming the District Court on June 26, 1953 (R 39-55).

DECISION OF THE COURT OF APPEALS

It is apparent from the opinion of the Court of Appeals that on no point here presented for review did that court have any direct authority for its position. Arguing from assumed analogies concerning enforcement of other administrative actions in other agencies, under other statutes, and under other factual situations (including even criminal proceedings), the Court arrived at the following conclusions, all of which Petitioner considers erroneous.

Thus the Court of Appeals erred in deciding that:

1. All books, papers, records and memoranda belonging to a taxpayer may be required to be produced; and he may not avail himself of the limitations and conditions of the Fourth and Fifth Amendments concerning them. Consequently, a mere custodian of documents which have been demanded by their owner (as was the case here with regard to certain documents) will be forced to produce such records, even though they do not belong to him and he has no legal possession or control over them (R 45-46).

The Court also erred in its determination that:

2. The Federal Rules of Civil Procedure do not apply to proceedings to compel the giving of testimony or the production of documents in an action by the United States for such purpose; and that, consequently, Rule 43(a) concerning the rules of evidence in civil proceedings does not apply. (R 51-53).

The Court erred in determining that:

3. Agents enrolled to practice before the Treasury Department are not within the privileged communications rule applicable to the attorney-client relationship. (R 49-51).

REASONS FOR GRANTING THE PETITION

The Court of Appeals has decided important questions of Federal law in a manner which conflicts, in basic principles applied, with decisions of other Federal courts and of this Court. Rules of Civil Procedure for the District Courts as promulgated by this Court have been brushed aside, and proceedings in significant fields of Federal law have been left without any guide to applicable rules of evidence.

In this case, a United States District Court has ordered an individual to produce for inspection by a revenue agent:

(1) Records over which the individual so ordered has no legal possession or control; and

(2) Records which clearly appear, under the rules promulgated by this Court and in justice and common sense, to be privileged communications.

The court's holding in the instant case that the Rules of Federal Procedure do not apply to proceedings to enforce production of documents for examination by revenue agents is squarely contradictory to the holding of the Ninth Circuit in *Martin v. Chandis Securities Co.*, CCA 9, 1942, 128 F 2d 731. [2] If those rules do apply, they must apply in toto unless specific exceptions are found in the statute. No such exception appears as to the applicable rules of evidence in the Internal Revenue Code; and consequently Rule 43(a) applies. That controversies of this kind between the government and the taxpayer are mere civil proceedings, in which the United States should occupy the same position as any other private party, has been decided by this Court in *McCrone v. United States,* 307 U.S. 61; 83 L. ed. 1108.

There is submitted hereto as Appendix A a memorandum brief in support of Petitioner's position. The conflicts in basic propositions between the decision of the Court of Appeals in the instant case, and those of other courts will there be demonstrated.

The administration of the revenues is admittedly an important function of the Federal government. But to its own best purpose that function must be conducted with fairness, restraint, and within the statutory and constitutional limitations imposed. We respectfully submit that the Court of Appeals and the District Court have failed to follow in this case the legal requirements for the conduct of investigations into taxpayers' affairs.

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[2] This case was cited in support of the 1946 amendment to Rule 81(a)(3). While that amendment may not strictly encompass the proceedings in the case, this should leave no doubt as to the intention of the rules to cover the type of proceeding for which this review is requested.

CONCLUSION

It is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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(2) MOTION FOR ORDER STAYING PROCEEDINGS IN THE DISTRICT COURT, IMPOUNDING DOCUMENTS AND RECORDS PRODUCED AND IMPOUNDING TESTIMONY TAKEN.

Your Petitioner respectfully moves the Court to enter an order staying further proceedings in this cause in the District Court of the United States for the Southern District of Florida, and ordering the District Court to impound any records, documents or other written matter which that Court may have ordered the Petitioner to turn over to any agent of the Bureau of Internal Revenue, and ordering the impounding by the District Court of any testimony taken in this cause pursuant to its order, pending the final disposition of the cause by this Court.

The Court of Appeals denied on July 13, 1953, the motion of Petitioner to stay its mandate for 30 days so that petition for certiorari might be filed in this Court without the prejudice of further action taken in the District Court. Your Petitioner believes that the matter should not proceed further in the District Court until finally disposed of by this Court.

DATED August 10, 1953.

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APPENDIX A

MEMORANDUM BRIEF IN SUPPORT OF PETITION

OUTLINE OF ARGUMENT

I. The Character of this Proceeding.

A. The Proceeding under §§ 3614, 3633 is Judicial.

Interstate Commerce Commission v. Brimson, 154 U.S. 447, 487; 38 L. ed. 1047, 1061.

8 *Wigmore on Evidence,* § 2195, p. 81.

B. This Proceeding is a Civil Proceeding.

McCrone v. United States, 307 U.S. 61; 83 L. ed. 1108.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418; 55 L. ed. 797.

Penfield Co. v. Securities and Exchange Commission, 330 U.S. 585; 91 L. ed. 1117.

II. Documents or records in the files of a certified public accountant which belonged to a taxpayer, who had demanded their return, cannot be ordered to be produced by the certified public accountant.

A. An order to produce documents cannot be issued against a person not having legal custody of the papers.

Edison Electric Light Co. v. United States Lighting Co., 44 Fed. 294, CC, SDNY, 1890.

Coveney v. Tannahill, 1 Hill, 33, 37 Amer. Decisions 287, 289.

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Dyer-Smith, *Federal Examinations before Trial*, (1939), § § 277-280A; pp. 218-221; § 472, p. 337.

III. A proceeding in the District Court to compel a witness to testify before an agent of the Bureau of Internal Revenue is governed by the Rules of Civil Procedure.

A. The Federal Rules of Civil Procedure apply in this case. 27

Rule 1.

Rule 81(a)(3)

Martin v. Chandis Securities Co., 128 F 2d 731.

B. The United States is in the same position as any other litigant. 28

McCrone v. United States, 307 U.S. 61, 63.

United States v. Stinson, 197 U.S. 200.

United States v. Barber Lumber Co., 169 F. 184, 186 (Circuit Court, D. Idaho, C.D. 1908)

Green v. United States, 76 U.S. 655; 19 L. ed. 806.

United States v. Seigel, 168 F. 2d 143, 146-147 (CA, DC, 1948).

C. Under the Rules of Civil Procedure, the competency and privilege of witnesses are governed by state laws. 32

5 *Moore's Federal Practice*, 2d ed.¶ 43.07, pp. 1332-1333.

Van Wie v. United States, 77 F. Supp. 22, 44 (D.C., N.D. Iowa, E.D., 1948).

8 *Cyclopedia of Federal Procedure,* 3rd ed. § 26.57, p. 72.

Matter of Lee Memorial Hospital, United States District Court, N.D.N.Y., Feb. 26, 1953, 1953 Prentice Hall Federal Tax Service ¶ 72.408, 1953 Commerce Clearing House Standard Federal Tax Reporter ¶ 9266.

D. The laws of the State of Florida, by specific statute, have made privileged all communications between certified public accountants and their clients.

§ 473.15, Florida Statutes 1951, (F.S.A. § 473.15).

IV. An enrolled practitioner before the Treasury Department should enjoy, as to privileged communications, the same status as an attorney at law.

A. The Supreme Court of the State of Florida has generally defined the relationship between a person enrolled to practice before the Treasury Department and the Tax Court, and his client, as being an attorney-client relationship.

Goodkind v. Wolkowsky, 180 So. 538 (1938).

B. Practitioners before the Treasury Department (whether attorneys-at-law or not) are subject to the attorney-client rule respecting privileged communications.

8 *Wigmore on Evidence,* § 2300 a, pp. 583-584.

ARGUMENT

THE PROCEEDING UNDER SECTIONS 3614, 3633 IS JUDICIAL

There has been much controversy about the administrative power of subpoena. Mr. Justice Murphy thought it ought not to exist because of abuses inherent in its use (*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, dissent at 218-219; 90 L. ed. 614, 635); and the balancing of its use and abuse in the public interest while still retaining a measure of privacy to the citizens has often "been generative of heat rather than light" (*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, at p. 202). *But this case does not even involve enforcement of an administrative subpoena.*

As we have pointed out in the petition (footnote 1), there is no provision for enforcement by the administrative agency itself of its so-called "summons" under Internal Revenue Code Section 3614; nor are there penalties for failing to heed a request made under that section[3]. (*In re Wolrich*, 84 F. Supp. 481, 482, (DC, SDNY, 1949); Barnes, *Inquisitorial Powers of the Federal Government Relating to Taxes*, 28 Taxes, The Tax Magazine, 1211, 1213, December 1950). Consequently, the character of the proceeding is determined, not by the sterile administrative request under § 3614, but by the court

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(3) Section 145(a), Internal Revenue Code, applied in *United States v. Murdock*, 284 U.S. 141, 76 L. Ed. 210, has apparently been properly construed by the government as being more limited in scope than § 3614. See Regulations 111, Section 29.145-1. So far as we know, the *Murdock* case, which was against a taxpayer, is the only one in which the government has attempted to apply criminal penalties for failure to give information in answer to a revenue agent's questions.

proceeding under § 3633. On petitioning the court under § 3633, any administrative proceeding is at an end; for a judicial proceeding has been initiated, which is complete and self-contained until its conclusion. (4)

Consequently, much of the body of law which has been built up concerning administrative subpoenas is not applicable. In this instance, within the same statute, we have a comparison between an administrative subpoena power (Internal Revenue Code § 3615) and a mere right to request a court to compel testimony (Internal Revenue Code §§ 3614, 3633). The administrative subpoena power is circumscribed, in the statute providing that authority, with detailed rules and regulations concerning its use (§ 3615); the application to the court to compel testimony (§ § 3614, 3633) is not. The difference lies in the closer supervision which it is presumed a court would apply to a proceeding entirely within its jurisdiction.

Thus the object of the combination of §§ 3614 and 3633 is much the same as that of the old deposition *in perpetuam rei memoriam* (28 USC § 644 before repeal by the 1948 Judicial Code) now contained in expanded form in Rule 27; or of the action to perpetuate testi-

(4) *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 487; 38 L. ed. 1047, 1061. Even Mr. Justice Cardozo, dissenting (with Mr. Justice Brandeis and the then Mr. Justice Stone) in *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 33; 80 L. Ed. 1015, 1030, referred to 'the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice". Whether testimony can constitutionally be compelled by the delegation to a purely administrative body of the power to punish for contempt may be arguable (see note 1 to dissenting opinion of Mr. Justice Murphy in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 at 511) but Congress has never attempted the delegation of that power, being content to leave that judicial function to a judicial proceeding. (Mr. Justice Frankfurter dissenting in *Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585, 603; 91 L. ed. 1117.)

mony still permitted under Rule 27(c). An important requirement of such an action has always been "that the testimony will be competent evidence" (*Arizona v. California*, 292 U.S. 341, 347; 78 L. ed. 1298, 1300). Such actions are, of course, governed by the Rules of Civil Procedure insofar as they are applicable to that type of proceeding; and they have been used by taxpayers in internal revenue matters. (5)

But whether or not the proceeding under § 3633 is to enforce an administrative subpoena or to compel testimony, the proceeding is *judicial*, and neither administrative nor "merely ancillary and advisory" to the administrative proceeding:

> "One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's case, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of

(5) *In re Ernst*, 2 Fed. R. Dec. 447.

duties legally imposed upon it by Congress in execution of a power granted by the Constitution."

Interstate Commerce Commission v. Brimson, 154 U.S. 447, 487; 38 L. ed. 1047, 1061.

"*Administrative Officers.* It has been common, when the Legislature creates an administrative office, to bestow the authority to summon witnesses, in aid of their inquiries for framing rules and deciding controversies. In the various State statutes are found hundreds of such provisions. The procedure of such officers (boards, commissions, etc.) may well enough take the form of a subpoena. But the ultimate act of enforcing answers is here, as before (*supra,* par 3) a judicial act, and both in logic and in policy it should require resort to a Superior Court for a ruling."

8 *Wigmore on Evidence,* § 2195, p. 81.

THIS PROCEEDING IS A CIVIL PROCEEDING

That this cause before the district court was a civil proceeding, the Court of Appeals appears to admit (R 52). In any event, this Court so decided in *McCrone v. United States,* 307 U.S. 61; 83 L. ed. 1118.[6] And in that case and in similar proceedings this Court has considered applicable certain of the rules of *civil* procedure. E.g. *Fleming v. Mohaw Wrecking & Lumber Co.,* 331 U.S. 111, 119 (Rule 25).

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(6) This Court in that case relied on *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 55 L. Ed. 797 (note 8, at U.S. page 64). Mr. Justice Rutledge, in his exhaustive concurring opinion in *Penfield Co. v. Securities and Exchange Commission,* 330 U.S. 585, at 596, 91 L. Ed. 1117 at 1126, points out that that case is authority for the proposition that "the character of the proceeding as a whole, whether as civil or criminal, must be correlated with the character of the penalty imposed. * * * This ruling . . . was one not only of historical grounding but of constitutional compulsion."

Thus, while such proceedings may be considered as *similar* to grand jury proceedings [7], they are *not* grand jury proceedings. For "an investigation by a grand jury is a criminal case" (*United States v. Monia*, 317 U.S. 424, 427; 87 L. ed. 376, 380), which follows the Rules of Criminal Procedure for the United States District Courts (e.g., Rule 6 (a)), and the rules of evidence prescribed by such procedure (Rule 26). These differ markedly from the rules in civil cases (Note of Advisory Committee to Rule 26, Rules of Criminal Procedure).

Thus, for purposes of this determination, judicial compulsion of testimony is analogous—not to a grand jury proceeding—but to "the court's in issuing other pretrial orders for the discovery of evidence" (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216; 90 L. ed. 614, 634). [8]

In summary, we have here a judicial proceeding, which is civil in character, and to which the rules of civil procedure must apply. The questions raised, therefore, are only as to the application of those rules to this case.

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[7] *Brownson v. United States*, 32 Fed. 2d 844, 849 (CA 8, 1929); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216; *Torras v. Stradley*, 103 F. Supp. 737, 739 (DC, NDGa, 1952), and cases there cited.

[8] We have previously referred to Rule 27 of the Civil Rules as comparable. The Court in this case refers to the bill of discovery in equity (preserved by Rule 27(c)), and Rules 26(a), 30(d), 45.

AN ORDER TO PRODUCE DOCUMENTS CANNOT BE ISSUED AGAINST A PERSON NOT HAVING LEGAL CUSTODY OF THE PAPERS

Regardless of the nature of the proceedings, an order cannot be issued against a person not having legal custody of the papers.

The cases dealing with this question have practically uniformly dealt with a fact situation where the subpoena has been directed to a person whose papers were in the hands of his attorney.

The case cited by the Court of Appeals, *Edison Electric Light Co. v. United States Electric Lighting Co.*, 44 Fed. 294, CC, SDNY, 1890, was a case of this type, where the proper officer of a corporate party refused to recall documents from its counsel so as to obey a subpoena *duces tecum*. That case referred to a number of cases where the *attorney* was subpoenaed, and referred to Lord Mansfield's opinion in one of these cases that—

> "instead of producing the papers, the attorney ought immediately upon receiving the subpoena to have delivered them up to his client." (at p. 297).

This is ancient and accepted law.

> "The attorney may be called to prove the existence of a paper, and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents. But he can not be compelled to produce or disclose the contents of a paper which has been deposited with him by his client; *Brandt v. Klein*, 17 Johns. 335; *Jackson v. McVey*, 18 Id. 330; *Rex v. Smith*, 1 Phil. Ev. 142; *Brard v. Ackerman*, 5 Esp. 119; and see *Bevan v. Waters*, 1 M. & M. 235; *Eicke v. Nokes*, Id. 303; Vin. Abr., Discovery, I; *Durkee v. Leland*, 4 Vern. 612; Anon., 8 Mass. 370. In *Wright v. Mayer*, 6 Ves. 280, Lord

Eldon said, he never heard of a *subpoena duces tecum* upon an attorney, to produce the papers of his client. In *Rex v. Dixon,* 3 Burr. 1687, the point was decided, that the attorney was not obliged to obey such a subpoena. Lord Mansfield said, that instead of producing the papers, the attorney ought immediately, upon receiving the subpoena, to have delivered them up to his client."

Coveney v. Tannahill, 1 Hill, 33, 37 Amer. Decisions 287, 289; and Annotations p. 1249.

Although there has been some relaxation of the rule that a subpoena duces tecum may never be served on an attorney[9], it has been in situations where the client was in a position to claim any other privilege he might have had—such as where the client was a party to the action in which the papers were required to be produced; e.g., *Pearson v. Yoder,* 39 Okla. 105, Ann. Cas. 1916 A, pp 62 et seq. The annotation to this case described, for example, the application of the client's privilege of self-incrimination to documents in the hands of an attorney:

"Even though documents placed in the hands of an attorney by his client may not be protected as confidential communications, they may nevertheless be protected under other privileges of the client. One of these privileges is that of exemption from self-incrimination. In no case is an attorney bound to produce papers of his client which may be used as evidence against him on a criminal charge. Rex v

(9) See footnote (11) for examples.

> Dixon, 3 Burr. (Eng.) 1687; Reg. v. Hankins, 2 C. & K. 823, 61 E.C.L. 823, 3 Cox C.C. 434; Anonymous, 8 Mass. 370; Com v. Moyer, 15 Phila. (Pa.) 397, 38 Leg. Int. 458; State v. Squires, 1 Tyler (Vt.) 147. Under this rule it has been held that an attorney is not bound to produce vouchers of his client before the grand jury on a charge of forgery."

In a judicial proceeding in support of an administrative investigation or inquisitorial action, such as the present one, the client or document owner is not and probably cannot become a party to the action. Thus the only effective way he may have for asserting a privilege other than that of attorney and client, is to have the papers in his hands, so that the administrative officer may proceed against him. He has a right—a *substantive* right—to papers and documents which are his. (10) In discussing an aspect of the privilege against self-incrimination of a bankrupt, Mr. Justice Brandeis referred to the exception concerning the books and papers of a bankrupt:

> "The cases which hold that a bankrupt must surrender books and papers, although they contain incriminating evidence, rest upon a principle different from that here involved. Re Harris, 221 U.S. 274, 55 L. ed. 732, 31 Sup. Ct. Rep. 557; Johnson v. United States, 228 U.S. 457, 57 L. ed. 919, 47 L.R.A. (N.S.) 263, 33 Sup. Ct. Rep. 572; Re Fuller, 262 U.S. 91, 67 L. ed. 881, 43 Sup. Ct. Rep. 496; Dier v. Banton, 262 U.S. 147, 67 L. ed. 915, 43 Sup. Ct. Rep. 533. The law requires a bankrupt to surrender his property. The books and papers of a business are

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(10) The case of *Burdeau v. McDowell,* 256 U.S. 465, where the United States was permitted to use stolen documents in a criminal prosecution was argued and decided on constitutional grounds. See dissent of Mr. Justice Brandeis, Mr. Justice Holmes concurring, at U.S. pp. 476-477, quoted in part by Mr. Justice Black, concurring in *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, 164; 95 L. Ed. 817, 850.

a part of the bankrupt estate. Section 70 a(1). To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property."

McCarthy v. Arndstein, 266 U. S. 34, 41; 69 L. ed. 158, 161 (The implications of this decision are discussed in the American Law Institute's *Model Code of Evidence,* (1942), pp. 137, 138.)

Consequently, when discovery or subpoena processes refer to documents in one's "possession, custody, or control" (e.g., Rule 34, Federal Rules of Civil Procedure), the reference is to "sole legal possession" of the documents or things ordered to be produced; that is, "the right and power of control" (Dyer-Smith, *Federal Examinations before Trial,* (1939), § § 277-280A; pp. 218-221; § 472, p. 337). If one having legal possession or control of such documents objects to their production, the mere custodian cannot properly be compelled to produce them (ibid, p. 220). (11)

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(11) *Bough v. Lee,* 29 F. Supp. 498 (DC, S.D.N.Y., 1939) is one of the infrequent civil cases where an attorney was compelled to produce documents; but the circumstances were peculiar. The court had previously determined that the document in the hands of the client was *not* privileged and should have been produced; and therefore the attorney having custody of the document was ordered to produce it. And the court held concerning the obligation of the client to produce that "control, not mere possession, is the determining factor". The client, of course, was before the court.

Grant v. United States, 227 U.S. 74; 57 L. Ed. 423, was a similar criminal case, with both attorney and client before the court. The court held that the documents were not privileged in the hands of the client, and were of a character not subject to the attorney-client privilege. Consequently the attorney should have produced them.

In the instant case, the client had demanded the return of documents in the accountant's file which were the client's (R 16); but for the district court's erroneous order that the accountant retain them (R 14), they would have had to be returned to the client. Thus it was the client, not the accountant, who had actual, legal custody and possession of those documents; and he, and not the accountant, must be ordered to produce them. On that order, the client would be entitled to assert any privilege which he considered that he had. (12)

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(12) The discussion of the court of appeals on this point (R 45-46) was not only premature but inaccurate. That court was without authority to decide whether the client had a privilege unless the client was before the court and asserted that privilege. Assuming that the client *was* before the court and had claimed his privilege, the only case cited by the court of appeals of even remote applicability is *Shapiro v. United States*, 335 U.S. 1; 92 L. Ed. 1787. That case, decided by a 5-4 decision of this Court, may be considered as the farthest possible extension of the "public documents" theory. And it would appear from that case that, in order to meet the "public documents" test, the court would first have to decide:

1. If the statutory record keeping requirements were beyond "the limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself". (at U.S. p. 32).

2. If the documents involved were such records as were "validly required by law to be kept" (at U.S. p. 16) (Cf., for example, the letter attached to a voucher in *Nicola v. United States*, 72 F. 2d 780, 784, cited by the court of appeals (R 46)).

THE FEDERAL RULES OF CIVIL PROCEDURE APPLY IN THIS CASE

We have previously pointed out that the proceedings in this case are judicial, and are of a civil nature. Consequently, the Rules of Civil Procedure apply (Rule 1), unless there is some specific exception in the rules themselves.[13] There is none; but on the contrary, they were made by the 1946 amendment specifically applicable to the analogous situation of "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings" (Rule 81(a)(3)). This is broad enough in principle to cover the instant case.

No statute or rule of court dictates the application of any other rules. Neither § 3614 nor § 3633 even infers that other rules may be applicable; unless there might be an inference from the somewhat summary nature of the proceeding, that the ordinary time limits for the various procedural steps need not be followed.[14]

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(13) No rules of procedure are set out in the statute. *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734, CA 9.

(14) They were not followed in this case, obviously, as the time from the filing of the petition until the court's final order was fifteen days. We have not objected to the almost unseemly haste with which the courts, at the instance of the government, have processed this cause. Our interest is in justice, not delay.

THE UNITED STATES IS IN THE SAME POSITION AS ANY OTHER LITIGANT IN A CIVIL CASE

In *McCrone v. United States,* 307 U. S. 61, 63, the petitioner argued that "proceedings to which the United States and its agents are parties cannot be civil". This Court held that it was a civil case.

Being a civil case, there is abundant authority for the proposition that the United States, in a civil case in its own courts, is in exactly the same position as any other litigant, and completely amenable to the rules applicable to those courts. In *United States v. Stinson,* 197 U. S. 200, this Court said:

> "The government is subjected to the same rules respecting the burden of proof, the quantity and *character of evidence,* the presumptions of law and fact, that attend the prosecution of a like action by an individual" (at p. 205). (Emphasis supplied.)

In a case cited by the Fifth Circuit in *In re Hargrove,* 96 F. 2d 168, 169, for the proposition that court rules have "the force and effect of law", the court answered the government's contention that the United States is "above and exempt from the rules of court":

> "To such a view I am unable to give my assent. It is utterly at variance with fundamental principles, and is impossible in practice. If the litigant is sovereign, the court is subject. It is the sworn duty of the judge "to administer justice without respect to persons." Rank cannot be recognized. How can rights be correctly weighed if one party is permitted to lay his hand upon the balance? It will not do to say that the government will act justly. If so, it should be left to adjudge its own controversies without the intervention of the courts. Nor is it material that the prerogatives of sovereignty are claimed only as to the rules of practice and procedure. Time and mode of the trial of a right are, not

infrequently, of the substance of the right itself. Delay may mean disaster, especially to the weaker party. "To none will we sell, to none will we deny, or delay, right or justice." So reads the Great Charter. It is a mistake to assume that rules of procedure are mere formalities, adopted with the view only to the convenience and dignity of the courts. They are intended to promote the more perfect administration of justice, and experience demonstrates that the courts can best fulfill their functions by exacting substantial compliance therewith. An individual cannot maintain an action against the government; but this exemption may be waived. So the government may voluntarily come into court, seeking relief against an individual. It comes, however, not as a sovereign, but as a suitor. Within its own domain the court is supreme. The government, having a controversy, may invoke the assistance of the courts; but in entering their portals it voluntarily divests itself of sovereignty, submits itself to their jurisdiction, and consents to conform to their rules and abide by their decrees."

United States v. Barber Lumber Co., 169 F. 184, 186 (Circuit Court, D. Idaho, C. D., 1908).

This has long been the law. The application of the Federal Act concerning the competence of interested parties (13 Statutes at Large 351, July 2, 1864) was brought into question by the government. The Supreme Court of the United States answered the question as follows:

"It is urged that the Government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to civil actions would seem to show that Congress intended it to apply to actions in which the Government is a party, as well as those between private persons. For the United States is a necessary party

in all criminal actions, which are excluded ex vi termini; and if it had been the intent to exclude all other actions in which the Government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the Government is not a party instead of confining it to civil actions."

Green v. United States, 76 U. S. 655, 19 L. Ed. 806.

A more recent case reiterates that conviction:

"We are told that in substance no injustice would result from ignoring the rules in this case. That may be, but it cannot justify the departure. Just as soon as rules of procedure are ignored in order to do substantial justice on the merits in a particular case, there are no rules. What is done in one case must be done in all. Of course, the prevention of manifest injustice may present another problem.

We are told that the United States is a different sort of litigant. It represents the public, we are told, and so must be permitted to pursue its own chosen course of action in respect to the method and time of proceeding in litigation. We know of no such rule. Of course, the Congress can prescribe the terms upon which the United States can be sued, but that doctrine, stretched to its utmost, does not mean that when the United States is a plaintiff it is not bound by the rules pertaining to the conduct of litigation in the courts."

United States v. Seigel, 168 F. 2d 143, 146-147 (CA, DC, 1948).

Thus in civil actions to which the United States or its agents has been a party, the Federal Rules of Civil Procedure have frequently been applied. *Application of Murra,* 166 F. 2d 605, a naturalization proceeding; *Kessler v. Fleming,* 163 F. 2d 464, a treble damage action under the Emergency Price Control Act; *C. C. Co. v.*

United States, 147 F. 2d 820, 824, Food, Drug and Cosmetic Act violation; *Application of Levis,* 46 F. Supp. 527, 529; *Petition of Weltzen,* 68 F. Supp. 1000, 1002; *Evans v. United States,* 10 FRD 255, 257; *Daltz Flying Corporation v. United States,* 4 FRD 472; *United States v. General Motors Corporation,* 2 FRD 528. At the time of the application of the Conformity Act (pre-1948 Judicial Code, Section 724), the state court rules were applied to actions by the United States to collect internal revenue taxes. *United States v. Scudder,* 2 F. 2d 632, 633, DC, EDNY, 1924; *United States v. Elliott,* 27 F. Supp 253, 254, DC, EDNY, 1939; *United States v. Northern Finance Corporation,* 16 F. 2d 998, 999, CA, 2, 1927.

In some ways the instant proceeding is the statutory equivalent of a Rule 27 proceeding, or of the discovery processes under the civil rules. No Federal statute prescribes different rules for the conduct of the proceeding under Section 3633, Internal Revenue Code. Consequently, the Rules of Civil Procedure do apply, including Rule 43(a) which determines the rules of evidence applicable to this proceeding. Rule 43(a) has been applied to a proceeding against the United States and a counterclaim by the United States. *Boerner v. United States,* 117 F. 2d 387, 391, CA 2, 1941.

UNDER THE RULES OF CIVIL PROCEDURE, THE COMPETENCY AND PRIVILEGE OF WITNESSES ARE GOVERNED BY STATE LAWS

The one thing which has always been crystal clear about Rule 43(a) is that under it the competency[15] and privilege of witnesses are governed by *state law*. As Professor Moore states the present result of Rule 43 (a)—

> "Privileged communications, like questions of competency, should present little difficulty. They are controlled principally by *state statutes*, which under Rule 43(a) *will clearly govern*, if no federal statutes or rules of court contrary to the state statutes are enacted or promulgated . . ." (Emphasis supplied.)
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> 5 *Moore's Federal Practice*, 2d ed. ¶ 43.07, pp. 1332-1333.

This rule is followed even where the privilege is in derogation of the common law, and in cases to which the United States is a party and which are covered by the Federal Rules:

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(15) The last sentence of Rule 43(a) reads: "The competency of a witness to testify shall be determined in like manner." Note of Advisory Committee to Rule 43(a) reads: "The last sentence in effect continues Title 28, § 631." Section 631 of the old judicial code (displaced by the Rules) stated: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held." The word "competency" as used in the Rule includes matters of privilege. 8 *Cyclopedia of Federal Procedure*, 3rd edition, § 26.31, pp. 43-44. *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 250, 254-255; 28 L. Ed. 708, 710. The application of this rule is thoroughly analyzed in *Lake Shore Nat. Bank v. Bellanca Aircraft Corp.*, 83 F. Supp. 795, 796-797 (DC, Del., 1949).

"The federal courts follow the law of the forum as to communications privileged by state statutes."[16]

Van Wie v. United States, 77 F. Supp. 22, 44 (D.C., N.D. Iowa, E.D., 1948), applying an Idaho statute on physician-patient privilege in a Federal Tort Claims case.

Admittedly, certain now-common privileged relationships did not exist at common law. Among the most common is the "physician-patient" privilege. This exists only by virtue of state statutes[17]. Exactly the same thing is true of the accountant-client relationship, and where that statutory privilege exists it must likewise be recognized in the federal courts[18].

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(16) Similar statements appear in: *Stiles v. Clifton Springs Sanitarium Co.,* 74 F. Supp. 907, 908; *Munzer v. Swedish American Line,* 35 F. Supp. 493, 496.

(17) 8 *Cyclopedia of Federal Procedure,* 3rd Ed., § 26.50, p. 67; 8 *Wigmore on Evidence,* § 2380, pp. 802, 803.

That local rules of privilege are applicable in administrative cases is to be inferred from *McMann v. Securities and Exchange Commission,* 87 F. 2d 377, 378, where the court refers to available privileges as being those of "a client, a penitent, a patient, or a spouse", at least two of whom, the penitent and the patient, would not have been the subject of privileged communications under common law.

(18) 8 *Cyclopedia of Federal Procedure,* 3rd Ed. § 26.57, p. 72.

This legislation is growing. According to *Wigmore* (vol. 8, § 2286, p. 537), at least the following states have recognized this privilege by statute:

Colorado (St. 1929, Mar. 26, p. 642, c. 185).
Florida (Florida Statutes, 1951, § 473.15).
Georgia (St. 1943, Mar. 19, No. 397, p. 363).
Illinois (St. 1927, July 7, p. 689, Smith-Hurd c. 110½, § 19).
Iowa (St. 1929, Apr. 13, c. 58, § 18, Code 1931, § 1905-c-17).
Kentucky (St. 1946, Mar. 23, c. 210, § 20).
New Mexico (St. 1939, Mar. 17, c. 235, § 1, amending § 45-512 St. Anno 1929; St. 1947, Mar. 18, c. 115, § 26).
Puerto Rico (St. 1945, May 15, No. 293, § 19).

In a very recent case decided in the United States District Court for the Northern District of New York, *Matter of Lee Memorial Hospital,* decided February 26, 1953, the Hospital declined to submit information requested by subpoena of the Director of Internal Revenue (§ 3615, Internal Revenue Code), relying or the *statutory* privilege of hospital records under Section 352 of the New York Civil Practice Act. The court held that the local statutory privilege applied to the proceeding, but that under New York interpretations of the Statute the particular information requested was not privileged.

The court cautioned the hospital, however, "to take all precaution necessary to insure that the treatment afforded any patient or the diagnosis of his illness shall not be disclosed" (the purpose of the statute). As to the application of the privilege, the court deemed the following matters settled:

> "Upon the question of privileged communications the federal court follows the law of the state of the forum, *(Munzer v. Swedish American Line,* 35 Fed. Supp. 493 at 496). Therefore, the statutory and judicial decisions of the State of New York control. The prohibition or privilege of Section 352 of the New York State Civil Practice Act applies to hospital records. *(Matter of N. Y. City Council v. Goldwater,* 284 N. Y. 296 at 299). No question is raised but that the statutory privilege may be asserted as a rule of evidence here, since the power of this court is invoked to compel a witness to disclose information. *(Matter of N. Y. City Council v. Goldwater,* supra, and Section 354 of the New York State Civil Practice Act). No claim is made that the statutory privilege has been waived in any manner by those for whom the protection is provided."

1953 Prentice Hall Federal Tax Service ¶ 72.408.

1953 Commerce Clearing House Standard Federal Tax Reporter ¶ 9266.

THE LAWS OF THE STATE OF FLORIDA, BY SPECIFIC STATUTE, HAVE MADE PRIVILEGED ALL COMMUNICATIONS BETWEEN CERTIFIED PUBLIC ACCOUNTANTS AND THEIR CLIENTS.

In Florida, the law of the forum is found in Section 473.15, Florida Statutes 1951 (F.S.A. § 473.15) which reads as follows:

> "All communications between certified public accountants and public accountants and the person for whom such certified public accountant or public accountant shall have made any audit or other investigation in a professional capacity, and all information obtained by certified public accountants and public accountants in their professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all of the courts of this state, and no such certified public accountant or public accountant shall be permitted to testify with respect to any of said matters, except with the consent in writing of such client or his legal representative."

This statutory accountant-client privilege effectively prohibits the Petitioner from testifying in this cause, and from producing any of the documents requested by the summons[19].

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[19] The Public Accountant Law, Chapter 473, Florida Statutes 1951, provides penalties for its violation in the following terms:

§ 473.23: "Any person:

(14) Who shall attempt by any subterfuge to evade the provisions of this chapter while practicing public accounting; . . .

Shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars for each offense or imprisonment in the county jail for a period not exceeding six months."

THE SUPREME COURT OF THE STATE OF FLORIDA HAS GENERALLY DEFINED THE RELATIONSHIP BETWEEN A PERSON ENROLLED TO PRACTICE BEFORE THE TREASURY DEPARTMENT AND THE TAX COURT, AND HIS CLIENT, AS BEING AN ATTORNEY-CLIENT RELATIONSHIP.

In addition to the express statutory accountant-client privilege, we submit that in Florida the attorney-client privilege extends to those certified public accountants who are enrolled practitioners before the Treasury Department, as is the Petitioner here (R. 19). In *Goodkind v. Wolkowsky,* 180 So. 538 (1938), the Supreme Court of Florida had before it, not the question of privilege, but of the accountant's fees for services before the Treasury Department and the Board of Tax Appeals (now the Tax Court). The Supreme Court of Florida decided that the certified public accountant's representation in that capacity was essentially that of an attorney-at-law, and was governed by the same principles of law.

> "The plaintiff below in this cause was employed to represent the taxpayers before this board or before the Commissioner of Internal Revenue. He was not employed simply to make an audit and under the terms of said contract his duty would be the same as if an attorney at law had been employed to represent any client before said board or before any court. We hold, therefore, that the employment of the plaintiff is governed by the same rules as would govern the employment of an attorney at law in this state."
>
> (at p. 540)

Thus Florida has recognized the rule that the attorney-client relationship arises, not from the mere technical status of the legal practitioner, but from the subject matter of the employment. If it falls within the

normal ambit of the practice of an attorney-at-law, the relationship of attorney and client exists. In the absence of an organized federal bar, and in the absence of a more restricted local definition[20] of the attorney-client privilege, it seems obvious that the state must determine who is and who is not a professional adviser[21] to whom the privilege is applicable.

PRACTITIONERS BEFORE THE TREASURY DEPARTMENT (WHETHER ATTORNEYS-AT-LAW OR NOT) ARE SUBJECT TO THE ATTORNEY-CLIENT RULE RESPECTING PRIVILEGED COMMUNICATIONS.

Regardless of whether state law or some other law[22] is applicable, if there is any attorney-client privilege at all it should most certainly extend to the communications between an enrolled practitioner before the Treasury Department and his client.

In deciding that the principles of law governing the attorney-client relationship are applicable to enrolled practitioners before administrative tribunals *(Goodkind v. Wolkowsky,* 180 So. 538), the Supreme Court of

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(20) E.g., *Kent Jewelry Corp. v. Kiefer,* 113 NYS 2d 12, 18.

(21) The older cases refer to the privilege in terms of "professional adviser" or "legal adviser". E.g., *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U.S. 457, 24 L. Ed. 251, 252-253.

(22) Inasmuch as this is not a criminal case and no rules of evidence or other procedural rules which the District Court should follow are set out in the statute, the Court of Appeals decision leaves unanswered the question of where the applicable law may be found.

Florida has recognized the facts of life in administrative practice. Some federal administrative agencies regularly enroll on their list of practitioners others than attorneys-at-law. This applies to the Treasury Department, which admits to practice before it, on the same basis as attorneys-at-law, certified public accountants[23].

Presumably the Department considers that it advantages itself by the admission of certified public accountants to such practice. The regulations specifically grant to certified public accountants so enrolled "the same rights, powers, and privileges" of enrolled attorneys, except that they may not "practice law"[24].

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[23] 31 CFR § 10.2(a) limits practice before the Treasury Department to enrollees. Section 10.3 provides for enrollment of attorneys at law and certified public accountants on exactly the same basis. Sections 10.6 and 10.7 provide for rosters of enrollees and "disbarment" proceedings, respectively. Section 10.2(b) provides the scope of practice for all enrollees in the following terms:

> "Practice before the Treasury Department shall be deemed to comprehend all matters connected with the presentation of a client's interests to the Treasury Department, including the preparation and filing of necessary written documents, and correspondence with the Treasury Department relative to such interests."

The only exception appears in § 10.2(f), quoted in the following note.

[24] The exceptions in full are:

> "Provided, That an enrolled agent shall not have the privilege of drafting or preparing any written instrument by which title to real or personal property may be conveyed or transferred for the purpose of affecting Federal taxes, nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the Federal taxes of such client; And provided further, That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law."

31 CFR § 10.2(f).

That they must necessarily advise concerning the internal revenue laws and their application in practice is inescapable from their enrollment to such practice.

No one required the Treasury Department to enroll such accountants to practice before it. It has done so, presumably to take advantage of their special knowledge and experience; and the government requests that this Court deny to such enrollees and their clients, a primary right in the effective use of the relationship which the Treasury Department itself established.

Dean Wigmore is not noted for his inclination to extend the field of privileged communications. On all questions of admissibility he is inclined to favor rules allowing the reception of evidence rather than its rejection. But he has no doubt that enrolled practitioners before administrative agencies must be covered by the privileged communications rule:

> "The wide extension of administrative powers to regulate many aspects of commercial, industrial, and social life is a notable feature of modern times. The subject of modes of proof before administrative bodies has become an important problem . . . The management of the citizen's interest, when affected by law or by rulings in the respective fields of control by such bodies, has had to be committed to thousands of specialists, qualified in those fields, though not qualified as attorneys-at-law in general, nor needing to be so qualified. The proceedings before such bodies are conducted under more or less formal rules of procedure; the hearings and the decisions are quasi-judicial in nature; the specialist, as the client's agent, has a natural and a responsible part in presenting the client's case. The client must confide in the agent precisely as he does in

the attorney. There is every reason (subject to the conditions above-named) for recognizing a privilege for those confidences; nor is there any apparent reason against it.

Naturally, judicial precedent in this field is scanty. *But the logic of the situation must ultimately prevail.*

Formally constituted bodies of such special practitioners appear hitherto to have been recognized only in some agencies in the Federal Government (not in the State Governments). In others no such organization has been undertaken.

A correct test for recognizing professional privilege would seem to be this: If the administrative department (bureau, board, commission, etc.) requires an oath of office and prior proof of professional qualifications and maintains a list of registered persons so qualified, or if in any other way its regulations treat the persons who appear before it representing the parties in interest as a licensed body having the responsibility of attorneys and subject to professional discipline (whether skilled in the general body of law or only in the matter peculiar to that department), *then the parties so represented are in the status of clients, and the clients are therefore entitled to the appropriate consequences, including the confidentiality of communications.*" (Emphasis supplied.)

8 *Wigmore on Evidence,* § 2300 a, pp. 583-584.

Professor Wigmore's reference to scanty judicial precedent is somewhat of an understatement. There are only a few cases, and none of those give serious consideration to the problem. The one possible exception is *Kent Jewelry Corp. v. Kiefer,* 113 NYS 2d 12, a case in the Supreme Court for New York County. The court in that case considered itself bound by the New York Civil Practice Act which limited the privileged communications rule to attorneys or counselors at law; and fur-

thermore, the court determined that the communications in question would not be privileged even if the attorney-client relationship existed.

In Florida, the attorney-client privilege is that of the common law[25], and not so restricted by rule or statute. It is thus subject to extensions dictated by sound logic and reason. For the government to contend that, either under Florida law or some federal common law theory, a government-sponsored relationship between an enrolled adviser on the revenue laws and his client does not come within the privileged communications rule shocks the conscience. It cannot claim all of the benefits of establishing that relationship, without accepting the usual conditions of its existence.

SUMMARY AND CONCLUSION

1. In ordering the Petitioner to produce documents which were not under his legal possession and control the District Court and the Court of Appeals violated legal principles of long standing.

2. In determining that the Rules of Civil Procedure were not applicable to this proceeding the District Court and the Court of Appeals are in conflict with the decisions of this Court and are particularly in conflict with the decision of the Ninth Circuit in *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734[26].

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[25] *Seaboard Air Line R. Co. v. Timmons*, 61 So. 2d 426, 428 (1952).

[26] "The Internal Revenue Code contains no provision specifying the procedure to be followed in invoking the jurisdiction of the court below. We believe, as appellant contends, that the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are applicable. The pleading denominated a "Petition" will be treated as a complaint, there being no provision for a "Petition". Under Rule 8(a), it was necessary for the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "

Obviously the Rules of Criminal Procedure do not apply. The statutes set up no rules which do apply. If the Court of Appeals was right in saying that the Civil Rules do not apply, then these proceedings are left without any guide as to their conduct, including applicable rules of evidence.

3. The government's having determined that it would accept certified public accountants as advisers on tax law to represent clients before the Treasury Department, and formally enrolled them to practice as such, must accord them the same privileges as are applicable to other legal advisers, including the attorney-client privilege, and the District Court and the Court of Appeals erred in denying that application of the confidential communications privilege.

It is, therefore, respectfully requested that this Court issue the writ hereinbefore petitioned.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 266

FRANK J. FALSONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Court of Appeals (R. 39–54) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 26, 1953 (R. 55). The petition for a writ of certiorari was filed August 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred in sustaining the District Court's order requiring the petitioner to appear and testify pursuant to a summons issued by a special agent of the Bureau of Internal Revenue under Section 3614 of the Internal Revenue Code

and to produce all records in his files relating to the designated tax returns of Salvatore and Maria Italiano, and of Anthony Distributors, Inc.

STATUTE, REGULATIONS, AND RULES INVOLVED

The pertinent provisions of the statute, regulations, and rules involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

The instant proceeding was instituted on behalf of the United States on April 9, 1953, in the United States District Court for the Southern District of Florida as a petition for an order requiring Frank J. Falsone, petitioner here, to produce certain records and to testify. The petition alleged that Frank J. Falsone, a certified public accountant, had in his custody certain records relating to matters which should be included in the income tax returns of Salvatore Italiano and his wife, Maria Italiano; that a summons issued under Section 3614 of the Internal Revenue Code had been served on Falsone by John W. Bartlett, Special Agent of the Bureau of Internal Revenue, who was investigating the tax liability of the Italianos; that such summons required Falsone to appear before the Agent at the time and place named to give testimony as to the tax liability of the Italianos and to bring all books, records and memoranda in his files relating to the individual income tax returns of the Italianos for 1940 to 1946, inclusive, and to the corporation returns of Anthony Distributors, Inc., for 1940 to 1951, inclusive; and that

Falsone had failed to produce such records and continued to refuse to do so or to testify regarding them. The petition prayed that an order be entered pursuant to Section 3633 of the Internal Revenue Code requiring Falsone to produce the records and to give the testimony requested. (R. 2–5.)

The petition was supported by the following papers attached thereto: A letter to the Agent which authorizes him to examine records and to take testimony (R. 6), the summons to Falsone (R. 7–8), an office memorandum indicating that the investigation was due to an alleged evasion of income taxes by Italiano, classified as a racketeer (R. 11), and an affidavit by Special Agent Bartlett (R. 9–10). The affidavit asserted that at the beginning of the investigation Salvatore Italiano had been requested to produce his books and records bearing on his tax liability for the years in question but had continuously refused to do so; that the investigation had revealed that for the years 1942 through 1951 the expenditures of the Italianos greatly exceeded their reported income; that three times they had filed amended returns disclosing income in excess of original figures; that Salvatore Italiano had engaged in the sale of beverages through Anthony Distributors, Inc., for a price in excess of the OPA ceiling and to his personal benefit; and that in order to verify the income of the Italianos it was necessary to make a determination by what is known as the net worth method, and to reconstruct their financial history in prior years.

The District Court ordered Falsone to appear before Special Agent Bartlett and produce the records requested and to testify concerning them on April 15, 1953 (R. 13–14). A motion to quash the summons and vacate this order was filed by Falsone on April 13, 1953 (R. 15–20). After hearing, the District Court denied the motion and amended the original order so as to require Falsone to appear before Special Agent Edgar W. Adair on April 30, 1953, rather than before Special Agent Bartlett, the original order to stand in all other respects (R. 26–27).

The Court of Appeals affirmed the order of the District Court (R. 55).

ARGUMENT

1. Petitioner's principal contention (Pet. 22–26) seems to be that he does not have legal custody of the documents involved because his client has demanded their return, and that the court below erred in affirming the trial court's order that he produce them. The contention is plainly without merit.

The summons involved here directed petitioner to appear before Special Agent Bartlett to testify and to produce records relative to the tax liability of the Italianos. This summons was issued by the agent pursuant to Section 3614 of the Internal Revenue Code, *infra*, pp. 13-14, which specifically authorizes the Commissioner or his designated agent, in ascertaining the correctness of any tax return, to examine the books, papers, records or memoranda bearing upon the matters required to be included in the return,

and to require the attendance of the taxpayer, or any officer or employee, or any other person having knowledge, to testify with reference to any matter required by law to be included in the tax returns being investigated. When petitioner refused to testify or to produce the requested records, a proceeding seeking enforcement of the summons was filed in the District Court under Section 3633 of the Internal Revenue Code *infra*, p. 14, and, in accordance with the authority granted therein, the District Court entered an order directing the petitioner to appear before the agent for the purpose of testifying and of producing the records designated.

Every person liable to income tax is required to keep such records and render such statements, make such returns and comply with such rules and regulations, as the Commissioner with the approval of the Secretary may prescribe. Section 54 (a), Internal Revenue Code, *infra*, p. 13. And the records which a taxpayer is required to keep must be available at all times for inspection by internal revenue officers and shall be retained so long as they are material in the administration of any internal revenue law. Sec. 29.54–1, Treasury Regulations 111, *infra*, pp. 14–15.

In the instant case, subsequent to the receipt by the Bureau of Internal Revenue of information indicating evasion of income taxes by the Italianos for the years 1947 to 1951, Agent Bartlett was assigned to investigate their tax liability (R. 11) but was unable to get any records from Salvatore Italiano, who continuously refused to produce them. After this

refusal Agent Bartlett asked Italiano's accountant, petitioner here, to testify and to produce their records. Petitioner has never denied having custody of such records or that he received them legally for the purpose of making out income tax returns for the Italianos. Since petitioner indicates (R. 16) that he has not returned them because of the District Court's order of April 9, 1953, it would appear that the Italianos had not made their demand prior to the institution of this proceeding. In any event, it is apparent that the petitioner now has papers bearing on the tax liability of the Italianos, and the Internal Revenue Agent has not been allowed to inspect them up to this time because of petitioner's objection.

Obviously, if a taxpayer and his accountant are allowed to evade an inspection of the taxpayer's records by handing them back and forth to each other while an investigation is being made, they can easily defeat the administration of justice. Such practice has been disapproved by the courts, and it has been held that neither attorneys nor accountants should be allowed to claim a privilege as to records if their clients would not be permitted to do so. *Grant* v. *United States*, 227 U. S. 74, 79; *Edison Electric L. Co.* v. *United States Electric L. Co.*, 44 Fed. 294, 297 (C. C. S. D. N. Y.); *In re Fisher*, 51 F. 2d 424 (S. D. N. Y.): *Petition of Borden Co.*, 75 F. Supp. 857 (N. D. Ill.); *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. Mass.); *Bough* v. *Lee*, 29 F. Supp. 498 (S. D. N. Y.); VIII Wigmore on *Evidence* (3d ed.), Sec. 2307.

It has also been generally held that records are not to be treated as privileged communications if they are required by statute or if they are records in which the public has an interest. *Shapiro* v. *United States*, 335 U. S. 1, 16–17. The records of the Italianos would have been subject to examination if they had been in their possession. *Zimmerman* v. *Wilson*, 105 F. 2d 583 (C. A. 3); *Sauber* v. *Whetstone*, 199 F. 2d 520 (C. A. 7), certiorari denied, 344 U. S. 928. Consequently, since the records would not be privileged in the hands of petitioner's clients, petitioner may not properly claim a privilege on account of them either.

Furthermore, under the broad powers of Section 3614, there is specific authority for the examination of records in the hands of a third party and for taking testimony concerning them. Thus, such a person, even though he is the accountant for the taxpayer being investigated, can be required under Section 3614 to testify and produce records relative to the matter. *Schulman* v. *Dunlap*, 105 F. Supp. 104 (S. D. N. Y.); *In re Wolrich*, 84 F. Supp. 481 (S. D. N. Y.); cf. *Donnelly* v. *United States*, 201 F. 2d 826 (C. A. 9), holding that a public accountant who was subpoenaed by a grand jury to produce copies of tax returns of clients had to obey the summons. Other third parties who have been required to produce records include bankers, brokers, and a telegraph company. See *United States* v. *First National Bank of Mobile*, 295 Fed. 142 (S. D. Ala.), affirmed, 267 U. S. 576; *Brownson* v. *United States*, 32 F. 2d 844

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(C. A. 8); *In re Andrews' Tax Liability*, 18 F. Supp. 804, 808 (D. Md.): *In re Upham's Income Tax*, 18 F. Supp. 737 (S. D. N. Y.); see also *Cooley* v. *Bergin*, 27 F. 2d 930 (D. Mass.). Petitioner may not properly invoke the rights granted by the Fourth Amendment to the United States Constitution with respect to unlawful searches and seizures. *Zimmerman* v. *Wilson*, 105 F. 2d 583 (C. A. 3); *United States* v. *First National Bank of Mobile*, *supra*.[1]

2. Petitioner further contends (Pet. 32–37) that since he is an accountant for the Italianos in the State of Florida the papers sought to be produced are privileged in his hands under the laws of that

[1] Petitioner's further claim (Pet. 36–41) that because communications between an accountant and his client are privileged under the Florida statute, he, as an enrolled practitioner before the Treasury Department, may properly invoke the same privilege that exists in Florida with respect to communications between an attorney and his client, is likewise without substance. As the court below pointed out (R. 51), the rules and regulations of the Treasury Department (for pertinent portions, see R. 50–51, footnote 12) grant enrolled agents the same rights, powers, and privileges as enrolled attorneys, but there is no provision to the effect that a client's communications to an enrolled agent shall be privileged. Moreover, if there were such a privilege, it would belong to the client, not to the agent. Cf. *Rogers* v. *United States*. 340 U. S. 367, 371–372. And even if the rules and regulations of the Treasury Department could be properly construed as conferring a privilege on an enrolled agent, they would be in conflict with the broad provisions of Section 3614, which make employees and officers of a taxpayer subject to examination, and permit inspection of any records which they may have relevant to the investigation being made of a taxpayer.

State, that Rule 43 (a) of the Federal Rules of Civil Procedure makes the state law applicable, and that he may not be properly required to produce them.

The error in petitioner's reasoning lies in his disregard of the important distinction between the Commissioner's authority to ascertain facts administratively under Section 3614 and the court's authority to enforce a summons under Section 3633. The former is not a judicial proceeding, but is inquisitorial and is independent of any court action. No rights of the parties are ever determined in such a proceeding and its fact-gathering function makes it similar to a grand jury investigation. *Bolich* v. *Rubel*, 67 F. 2d 894 (C. A. 2); *Brownson* v. *United States, supra; In re Lyons*, 32 F. Supp. 92 (E. D. N. Y.); cf. *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186, 216. Thus, if the District Court's order is sustained and testimony is eventually taken by the Revenue Agent, that proceeding will be strictly an investigation and its procedure and scope will be unaffected by the fact that this proceeding to compel obedience to the summons had to be held. The scope of the administrative proceeding will be as broad as it would have been if the petitioner had obeyed the summons in the first instance. While it is true that Rule 81 (a), *infra*, p. 16, provides that the Federal Rules of Civil Procedure shall be applicable in proceedings to compel the giving of testimony, that provision, as the court below in effect held, makes the Rules govern in court actions, such as those brought under Section 3633, only with respect to evidence

adduced for the purpose of determining whether the subpoena shall be enforced, and not with respect to the evidence called for by the subpoena to be produced in the administrative proceeding initiated under Section 3614.[2]

The proceeding before the Internal Revenue Agent does not, as petitioner seems to contend, become a civil case, subject to the Federal Rules of Civil Procedure, simply because a witness refused to comply with the summons and the Commissioner is required to invoke judicial aid under Code Section 3633. Any other view would narrow the investigatory powers of the Commissioner to the strict confines of a judicial proceeding, for witnesses, by refusing to comply with the summons and by requiring judicial enforcement, would have it within their power to

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[2] Rule 43 (a), on which petitioner relies, states that the testimony of witnesses shall be taken "orally in open court" and provides further that the evidence to be admitted is that which is admissible under statutes of the United States, or under the rules of evidence formerly applied in federal equity suits or under the rules of evidence applied in the courts of the state in which the United States court is held. But it is significant that, in cases of a conflict, Rule 43 (a) provides that the statute favoring the reception of the evidence shall govern. Thus it could be argued that, in view of the broad powers under Section 3614, Florida law could not be allowed to limit or exclude the requested testimony even under petitioner's theory of the law. But the better answer is that Rule 43 (a) is not applicable to inquiries of fact conducted by administrative officers.

prevent the Commissioner from exercising the broad administrative powers conferred by Congress.

Martin v. *Chandis Securities Co.*, 128 F. 2d 731 (C. A. 9), relied on by the petitioner, does not hold to the contrary. There, a petition was also filed by a revenue agent in the District Court under Section 3633 after a summons had been issued to a corporation to produce papers relating to the tax liability of one of its stockholders. The Court of Appeals ruled that since the Internal Revenue Code specified no procedure to be followed in invoking the jurisdiction of the District Court under Section 3633, the Federal Rules of Civil Procedure would be applied and that the petition would be treated as a complaint under Rule 8 (a), which must show that the pleader is entitled to relief. Since Section 3631 of the Internal Revenue Code provides that a taxpayer shall not be subject to "unnecessary examinations or investigations" and since, as the court viewed the petition, it appeared that the requested examination was unnecessary, it was held that testimony would not be compelled.

The *Chandis Securities* case, therefore, goes no farther than to hold that the Commissioner may not invoke judicial aid for an examination not authorized by the Internal Revenue Code. It does not hold that proceedings under Section 3614, even when a summons issued therein is judicially enforced, are subject to the Federal Rules or are to be confined

by the exclusionary rules of evidence applicable in a judicial proceeding.[3]

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not called for. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1953.

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[3] In the court below, the Government moved to dismiss the appeal on the ground that the order of the District Court was not a final order and therefore not appealable. Although the court below ruled that the District Court's order was appealable (R. 41-42), it recognized that a contrary result had been reached by the Seventh Circuit in *Jarecki* v. *Whetstone*, 192 F. 2d 121. In the event a writ of certiorari is granted herein, we shall discuss the jurisdictional point at greater length.

APPENDIX

Internal Revenue Code:

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

(b) *To Determine Liability to Tax.*—Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter.

* * * * *

(26 U. S. C. 1946 ed., Sec. 54.)

SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.

(a) *To Determine Liability of the Taxpayer.*—The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with

reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3614.)

SEC. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3633.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.54–1 [as amended by T. D. 5381, 1944 Cum. Bull. 188]. *Records and income tax forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. * * * The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

Income-tax forms shall be prescribed by the Commissioner and shall be executed and filed in accordance with these regulations and the instructions on the form or issued therewith.

The provisions of section 54 (f) relieving certain specified types of organizations exempt from tax under section 101 from filing annual returns do not abridge or impair in any way the powers and authority of the Commissioner provided for in other provisions of the Internal Revenue Code to require the filing of such returns by such organizations. * * *

Federal Rules of Civil Procedure:

Rule 1 [as amended December 29, 1948]. *Scope of Rules.*—These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 43. Evidence.

(a) *Form and Admissibility.*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) *Scope of Examination and Cross-Examination.*—A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

* * * * *

Rule 81. Applicability in General.

(a) *To What Proceedings Applicable.*

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(3) [as amended December 27, 1946, and December 29, 1948] In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, c. 347, §9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

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